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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002128-WC

CHARLES PAULLEY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-96-86412

MCMILLAN LANDSCAPING; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; HON. ROBERT L. WHITTAKER, DIRECTOR OF SPECIAL FUND; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND: NO. 1999-CA-002312-WC

MCMILLAN LANDSCAPING — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-96-86412

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OPINION AND ORDER
AFFIRMING &
DISMISSING SPECIAL FUND AS A PARTY
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Charles Paulley (Paulley) appeals from an opinion of the Workers' Compensation Board (the Board) entered August 6, 1999, affirming an opinion and award of the Administrative Law Judge granting him benefits for a 30% occupational disability. McMillan Landscaping (McMillan) has filed a cross-appeal from the Board's opinion arguing that the Board erred in reversing the ALJ's reduction of Paulley's award by 15% pursuant to KRS 342.165. We affirm as to both Paulley's appeal and McMillan's cross-appeal.

Paulley sustained a closed head injury and lacerations as a result of a traffic accident which occurred on July 1, 1996, when his company vehicle was broadsided on the passenger side by a tractor-trailer. Paulley was removed from the scene of the accident and taken to a local hospital, where he was treated for a concussion. Although Paulley attempted to return to work some seven weeks after the accident, he found he was unable to continue working in his former employment after approximately three weeks.

At his deposition, Paulley was unable to testify with any certainty whether he was wearing a seat belt at the time of the accident, although he did indicate that the police report said he was wearing a seat belt. Paulley also stated that the ambulance crew cut through the seat belt while freeing him from the wreckage. Paulley testified at the hearing that he generally uses a seat belt while driving. Records from the ambulance crew

responding to the wreck indicate that Paulley was not wearing a seat belt.

Paulley was treated by Dr. Charles Oates (Dr. Oates) following the accident. In a letter to Paulley's attorney dated October 2, 1998, Dr. Oates stated that Paulley was suffering from "significant" post concussive syndrome as a result of the accident. Dr. Oates indicated that Paulley was reporting migraines, vertigo, neck and shoulder pain, panic attacks, and problems with memory and concentration. Dr. Oates stated that Paulley:

> remains with a permanent impairment, which now two years out, does not appear to have any chance of abatement in total. My estimation of his permanent disability would be at 30%. I do not ascribe to the American Medical Association's guidelines for evaluation of impairment, in as much, as this does not give aggregate summing of multiple disorders as for etiology of a patient's whole body systems [sic] abnormality.

Paulley was also seen by Dr. Burton Cohen (Dr. Cohen), an otorhinolaryngologist. Dr. Cohen initially saw Paulley on March 11, 1997, at which time he diagnosed bilateral benign paroxysmal positional vertigo. Dr. Cohen recommended vestibular rehabilitation, and indicated that Paulley should "be very careful about . . . working around any equipment, driving a truck, climbing ladders or anything that require his balance because if he turns his head he may become vertiginous and fall and injury himself." In a follow-up visit on June 7, 1997, following rehabilitation, Dr. Cohen noted some improvement with regard to vertigo, but indicated that Paulley was still having

problems with panic attacks. Dr. Cohen recommended that Pauley be referred to a neurologist and psychiatrist.

Paulley was also treated by Dr. David Petruska, a neurologist. In his deposition, Dr. Petruska gave a diagnosis of post-concussive syndrome. In regard to whether a seat belt would have prevented Paulley's head injuries, Dr. Petruska stated:

> Well, the theory behind a shoulder harness is that basically it should prevent those sort of injuries. However, you know, it really depends on the angle of trajectory of the car, and, as you say, whether or not the seat belt was functioning properly. The theory is that should prevent any sort of chest or forward movement of the body during an impact.

Dr. Petruska indicated that patients with post-concussive syndrome typically improve over time.

Finally, Paulley was evaluated twice by Dr. David Shraberg (Dr. Shraberg), a psychiatrist. Following an evaluation on August 14, 1997, Dr. Shraberg indicated that he found no evidence of panic attacks, and noted in his history that while Paulley complained of migraines, he denied experiencing panic attacks. Dr. Shraberg did note the presence of anxiety, and felt that the vertigo and headaches were caused by Paulley's high anxiety level. Dr. Shraberg diagnosed post-concussive syndrome with residual vertigo, mild tinnitus, and hyperacusis with anxiety. He believed Paulley would reach maximum medical improvement (MMI) within eighteen months after the accident.

Dr. Shraberg evaluated Paulley again on January 22, 1998, and noted minimal improvement. Dr. Shraberg indicated that Paulley appeared to have reached MMI. In what appears to be a

follow-up report from this evaluation, Dr. Shraberg assigned an impairment rating of 12-15% to the body as a whole arising from his neurological findings and symptomatology. Of that rating, two-thirds was attributed to vertigo and the remainder to anxiety. At his deposition, Dr. Shraberg stated that the severity of Paulley's condition would improve over time and that he would not have a permanent significant impairment. Dr. Shraberg believed that Paulley would not have any further difficulty operating heavy machinery once free from vertigo. If the vertigo did not improve, Dr. Shraberg indicated that with vocational rehabilitation, Paulley would be able to perform other jobs aside from operating heavy equipment.

McMillan also offered testimony from Jan McMillan, one of its employees. According to Ms. McMillan, the driver's side seat belt of the truck Paulley was driving at the time of the accident was not cut and was fully operational.

On March 10, 1999, the ALJ entered an opinion and award of benefits pursuant to a 30% occupational disability rating. In so holding, the ALJ stated:

> [I]n determining that plaintiff has a 30% occupational disability, the Administrative Law Judge has relied upon the testimony of all of the physicians testifying herein but must say that plaintiff's constellation of symptoms does not fit easily into a determination of occupational disability. As Dr. Oates said, it is difficult to assess plaintiff's impairment pursuant to the AMA Guidelines. He did assess a 30% impairment outside the guidelines and the Administrative Law Judge finds that the 30% impairment rating adequately translates into plaintiff's occupational disability. While plaintiff complains of a multitude of symptoms, it is apparent that his primary problem is vertigo

> which may prevent him from working in hazardous areas and in operating heavy equipment, but it appears to the Administrative Law Judge that there are a number of other positions which the plaintiff could perform with his restrictions. The Administrative Law Judge notes that the plaintiff has no neurological problems and all objective tests are normal. No physician has assessed restrictions upon the plaintiff except Dr. Shraberg who stated that if plaintiff continues to have vertigo, he cannot operate heavy equipment. When all the factors are considered, the Administrative Law Judge finds that 30% adequately addresses plaintiff's occupational disability.

The award further provided:

> [McMillan] has requested a 15% reduction for plaintiff's failure to wear a safety belt as found in KRS 342.165. That statute requires the plaintiff to intentionally fail to have used a safety appliance furnished by the employer or to obey any law enacted for the safety of employees or the public. By law, plaintiff was required to wear a seat or shoulder belt at the time of the injury. The Administrative Law Judge finds that plaintiff was an unrestrained driver based upon the EMS report. The Administrative Law Judge finds that plaintiff's failure to wear a seatbelt was a substantial contributing factor in causing plaintiff's head injury and therefore plaintiff's occupational disability award shall be reduced by 15%.

In an opinion rendered August 6, 1999, the Board affirmed the ALJ's holding in regard to Paulley's occupational disability rating, but reversed the ALJ's decision to reduce Paulley's award by 15% pursuant to KRS 342.165. In so ruling, the Board stated:

> Kentucky law has long distinguished between the accident and the injury. Fiorella v. Clark, 298 Ky. 817, 184 SW2d 208 (1944). Injury is defined in KRS 342.0011 as a work-related harmful change in the human organism while an accident is that event which arises out of and is in the course of employment and

> gives rise to the injury. Here, the ALJ based the reduction upon the injury and not the accident. However, we believe that the statute is unambiguous on its face and, in such circumstances, it must be construed without resort to outside aid and words are to be used according to common and approved usage. [citations omitted] Further, while some might assume that the policy behind the ALJ's decision to reduce benefits make [sic] a great deal of sense, statutory construction mandates following the plain meaning of that statute and not ignoring it simply because there may be a better policy. [citation omitted] The plain language of this statute requires the accident to be caused by the intentional failure to use a safety device and not the injury or symptomatology. The ALJ therefore erred, in our opinion, in reducing the benefits by 15%.

This appeal and cross appeal followed.

On his appeal, Paulley maintains that the evidence contained in the record compels a finding that he is totally and permanently disabled. Having reviewed the evidence contained in the record on appeal, we disagree and adopt the following portion of the Board's opinion as our own:

> When, as here, the party with the burden of proof is unsuccessful before the ALJ, then we must view the evidence to determine whether it compelled a contrary result. Special Fund vs. Francis, 708 SW2d 641 (1966); and Wolf Creek Collieries vs. Crum, Ky. App., 673 SW2d 735 (1984). As previously noted, the ALJ concluded that based upon the totality of the evidence and specifically noting that the only restrictions of record were those assessed by Dr. Shraberg, although likewise these were confirmed by Dr. Petruska, that Paulley should avoid operating heavy equipment, he was not totally disabled and 30% disability was appropriate. Paulley believes that the evidence compelled a finding of total occupational disability. We, however, cannot agree.
>
> Certainly, another ALJ viewing the same evidence could have concluded that Paulley

> was totally occupationally disabled at this time. That, however, is not the standard. McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974). The determination of occupational disability is uniquely the function of the fact finder/ALJ. It requires the ALJ to consider a variety of factors and at the time those factors were set out in KRS 342.0011(11) and Osborne vs. Johnson, Ky., 432 SW2d 800 (1968). It is clear that the evidence, including the evidence from Dr. Shraberg, supports the conclusion that Paulley continues to experience symptomatology associated with the vehicular accident that prevents him from operating heavy equipment. While the operation of heavy equipment was his most recent job function, the Court in [Osborne] noted that in determining occupational disability the fact finder is not limited to an analysis of only an individual's regular job. The ALJ further noted both the testimony of Dr. Shraberg and Dr. Petruska which he found to be credible as indicating that this type of injury would be expected to dissipate in its symptomatology over time. It is further clear in the ALJ's award in permitting the award of temporary total disability benefits from July 1996 through January 1988 that he recognized the testimony of Dr. Oates and Dr. Cohen, both of whom directed most of their treatment and comments to late 1996 through 1997. In assessing occupational disability, no single factor is controlling and it can rarely be said that a specific level of occupational disability is mandated. Seventh Street Road Tobacco Warehouse vs. Stillwell, Ky., 550 SW2d 469 (1976); and Millers Lane Concrete Co., Inc., vs. Dennis, Ky. App., 599 SW2d 464 (1980). Further, while evidence from Paulley himself is probative, it is not controlling. Caudill vs. Maloney's Discount Stores, Ky., 560 SW2d 15 (1977).

On its cross-appeal, McMillian argues that the Board erred in reversing the ALJ's decision to reduce Paulley's benefits by 15% pursuant to KRS 342.165 for failing to wear his seat belt. We disagree.

KRS 342.165 provides in pertinent part:

> If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter, shall be decreased fifteen percent (15%) in the amount of each payment.

We agree with the Board that KRS 342.165 is unambiguous. As the Board noted, "[t]he plain meaning of the statute requires the accident to be caused by the intentional failure to use a safety device and not the injury or symptomatology." If the General Assembly intended there to be a causal connection between the injury and the failure to use a safety device, it was quite capable of substituting "injury" for "accident" in the statute.[1] "It is our responsibility to ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not expressed." Flying J Travel Plaza v. Com., Transp. Cabinet, Dept. of Highways, Ky., 928 S.W.2d 344, 347 (1996).

Although the Special Fund was included as a party to Paulley's claim, it was dismissed by the ALJ in his opinion and award without objection by either party. As the Special Fund is not implicated in any way in this appeal, we order that it be and hereby is dismissed from these proceedings as well.

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[1] In fact, other jurisdictions have done so. See, i.e., Swillum v. Empire Gas Transport, Inc., 698 S.W.2d 921 (Mo.App. 1985)(Section 287.120.5 RSMo 1978 requires 15% reduction where injury is caused by employee's disregard of safety rule); McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177(Fla.App. 1982)(Florida law requires nexus between violation of safety statute and injury for 25% reduction to apply).

Having considered both parties' arguments on appeal and cross appeal, the opinion of the Workers' Compensation Board is affirmed in its entirety.

ALL CONCUR.

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: June 9, 2000

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